Filed 4/15/03 In re Joshua S. CA2/6

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re JOSHUA S., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B159421 (Super. Ct. No. J051562) (Ventura County)
THE PEOPLE, Plaintiff and Respondent, v. JOSHUA S., Defendant and Appellant.	

Joshua S. appeals from an order of the juvenile court committing him to the California Youth Authority (CYA) for a maximum period of four years, ten months. The order was made following his admission of probation violations. The violations were alleged in notices filed by the probation officer pursuant to Welfare and Institutions Code section 777.[1] Some, but not all, of the violations constituted criminal conduct. Appellant contends that a violation of juvenile probation cannot be based upon the commission of a criminal offense. He also contends that the juvenile court abused its discretion in committing him to CYA. We affirm.

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

Facts And Procedural History

Appellant was born in February 1984. In June 1999 a section 602 petition was sustained after appellant admitted that he had possessed an alcoholic beverage in violation of Business and Professions Code section 25662, subdivision (a). Appellant was placed on probation.

A subsequent section 602 petition was filed on September 7, 2000. The petition was sustained after appellant admitted that he had made terrorist threats in violation of Penal Code section 422. The juvenile court placed him on probation and ordered that he be committed to the Colston Youth Center for a maximum period of 120 days.

On September 22, 2000, a second subsequent section 602 petition was filed alleging that appellant had committed misdemeanor vandalism. (Pen. Code, § 594, subd (b)(4).) He admitted the offense and was placed on probation.

In February 2001 a third subsequent section 602 petition was filed. Appellant admitted that he had committed an assault by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).) According to the probation officer's report, appellant and another juvenile punched and kicked the victim, who had a Hispanic surname. During the assault, appellant and the other juvenile yelled, "Fuck Mexicans," and identified themselves as "Nazi Skinheads." They threatened to kill the victim if he reported the incident to the police. Appellant was placed on probation and ordered to serve a maximum period of 240 days in the Work, Education, Recovery & Competency ("WERC") program.

In September 2001 appellant was released from the WERC program. In May 2002, when appellant was 18 years old, the probation officer filed section 777 notices alleging probation violations and recommending that appellant be committed to CYA. Some of the violations constituted criminal conduct: the use or possession of cocaine and methamphetamine. Appellant admitted the violations.

Probation Violations Constituting Criminal Conduct May
Be Alleged Pursuant To The Notice Procedure Of Section 777

Appellant contends that the order committing him to CYA must be reversed because the juvenile court erroneously and prejudicially considered probation violations constituting criminal conduct. Appellant relies on *In re Marcus A.* (2001) 91 Cal.App.4th 423. In *Marcus A.* the appellate court accepted respondent's concession that probation violations constituting criminal conduct may not be alleged in a section 777 proceeding to modify a previous disposition order. The concession was based on the amendment of section 777 by Proposition 21, approved by the voters at the primary election on March 7, 2000.

Before the amendment, section 777, subdivision (a)(2), provided that a supplemental petition requesting the modification of a previous disposition order may be filed as follows: "By the probation officer or the prosecuting attorney, after consulting with the probation officer, if the minor is a court ward or probationer under Section 602 in the original matter and the supplemental petition alleges a violation of a condition of probation not amounting to a crime. . . . *The petition shall be filed by the prosecuting attorney, after consulting with the probation officer, if . . . the petition alleges a violation of a condition of probation amounting to a crime*." (Italics added.) Proposition 21 omitted the italicized language and provided for the filing of a notice instead of a supplemental petition.[2] The *Marcus A.* court concluded that, in view of the amendment, section 777 now applies "only to those violations of probation that do not amount to a crime." (*In re Marcus A., supra,* 91 Cal.App.4th at p. 427.)

Respondent has repudiated its concession in *Marcus A.* It contends: "Amended section 777 may be used to initiate proceedings to impose a more restrictive placement

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2 As amended, section 777, subdivision (a)(2), provides that the notice shall be made "[b]y the probation officer or the prosecuting attorney if the minor is a court ward or probationer under Section 602 in the original matter and the notice alleges a violation of a condition of probation not amounting to a crime. The notice shall contain a concise statement of facts sufficient to support this conclusion."

based on any violation of a condition of probation, including one that involves arguably criminal conduct, provided no new criminal offense is alleged." The issue is pending before our Supreme Court in *In re Emiliano M.* (2002) 99 Cal.App.4th 304, review granted July 31, 2002, S107904, and *In re Eddie M.* (2002) 100 Cal.App.4th 1224, review granted October 23, 2002, S109902.

We conclude that *Marcus A.* was wrongly decided. In construing Proposition 21, "our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure. [Citations.]" (*In re Littlefield* (1993) 5 Cal.4th 122, 130.) "We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language 'in isolation.' [Citation.] Rather, we look to 'the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . . . [Citation.]' [Citation.] That is, we construe the words in question ' "in context, keeping in mind the nature and obvious purpose of the statute . . . ." [Citation.]' [Citation.]" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) " ' " '[L]anguage of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' " ' [Citation.] In such circumstances, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citations.]" (*People v. Broussard* (1993) 5 Cal.4th 1067, 1071-1072.)

The *Marcus A.* interpretation of section 777, subdivision (a)(2), would result in absurd consequences that the voters did not intend when they passed Proposition 21. According to *Marcus A.*, the juvenile court may not consider probation violations, however egregious, if the violations constituted criminal conduct. Probationers would be accountable to the juvenile court for minor, noncriminal violations, but would not be accountable for serious violations amounting to crimes. A juvenile probationer who committed a criminal offense would violate his probation with impunity. The prosecuting attorney's only recourse would be to file a new section 602 petition.

On the other hand, if a probationer were 18 years of age or older when he committed a criminal offense, a section 602 petition could not be filed. The prosecuting

attorney would have to bypass the juvenile justice system and file a criminal action, even though the juvenile court generally may retain jurisdiction over a ward until the age of 21 years. (§ 607, subd. (a).)[3]

The voters who passed Proposition 21 intended to deter juvenile crime by assuring that juvenile offenders would suffer serious consequences for their criminal acts. The ballot pamphlet argument in favor of the initiative told the voters: "Proposition 21 - the Gang Violence and Juvenile Crime Prevention Act - will toughen the law to safeguard you and your family." "[*T*]*he law must be strengthened to require serious consequences, protecting you from the most violent juvenile criminals and gang offenders.*" "Californians must send a clear message that violent juvenile criminals will be held accountable for their actions and that the punishment will fit the crime." (Ballot Pamp., Primary Elec. (March 7, 2000), argument in favor of Prop. 21, p. 48.) The goal of strengthening the juvenile justice system to protect the public would be frustrated if wards could not be held accountable for probation violations constituting criminal conduct. Accordingly, we conclude that such probation violations may be alleged pursuant to the notice procedure of section 777. The juvenile court, therefore, did not err in considering appellant's probation violations based on the use or possession of cocaine and methamphetamine .

But even if the juvenile court had erred, the error would have been harmless. Appellant admitted numerous probation violations not amounting to crimes: (1) he failed to report regularly to the probation officer; (2) he failed to attend school; (3) he failed to participate in a program designed to assist him in securing employment; (4) he failed to submit to testing for controlled substances and alcohol; (5) he used or possessed alcohol on four occasions (on one occasion his blood-alcohol level was .24 percent);[4] (6) he

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[3] If a ward is committed to CYA for an offense listed in section 707, subdivision (b) or (d)(2), jurisdiction may be retained until the age of 25 years. (§ 607, subd. (b).)

[4] Appellant contends that the probation violations involving alcohol constituted criminal conduct. She cites Business and Professions Code section 25662 and Penal Code section

tested positive for marijuana on two occasions;[5] and (7) he failed to pay restitution to the State Restitution Fund and to the victim of the assault by means of force likely to produce great bodily injury. The juvenile court's remarks clearly indicate that it would have committed appellant to CYA based on these admitted violations: "[T]he reason he ends up in [C]YA is because once you have exhausted all the local options, then you are left with [C]YA . . . ." "He is too dangerous to be out of custody; obviously he is a danger to himself because he will hurt himself. He will get drunk, use drugs, or hurt somebody else, and he has a history of doing antisocial acts that are dangerous to the public. That leaves [C]YA." "We have used up everything and [C]YA is the only thing left."

The Juvenile Court Did Not Abuse Its Discretion

In Committing Appellant To CYA

Appellant contends that the juvenile court abused its discretion in committing him to CYA because it failed to adequately consider the less restrictive alternative of permitting him to again participate in the WERC program. "To support a CYA commitment, it is required that there be evidence in the record demonstrating probable benefit to the minor, and evidence supporting a determination that less restrictive alternatives are ineffective or inappropriate." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.) A juvenile court's commitment of a minor to CYA will be reversed only if the court abused its discretion. (*In re George M.* (1993) 14 Cal.App.4th 376, 379.) " 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

The juvenile court did not abuse its discretion. It had a reasonable basis for rejecting the WERC program. As the probation officer observed in his supplemental report, appellant had "already been afforded the opportunity to participate in that rehabilitative program." Appellant failed to benefit from his participation. Accordingly,

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647, subdivision (f). But the alleged probation violations did not meet the requirements of either section.

[5] Appellant does not cite any statute that would impose criminal liability for a positive marijuana test.

the juvenile court reasonably concluded that further participation in the WERC program would be ineffective or inappropriate. The court noted that the program is "something you do not just keep using and using over and over again. It's not a long-term facility."

Disposition

The order of commitment to CYA is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

John E. Dobroth, Judge

Superior Court County of Ventura

Laini Millar Melneck, under appointment by the Court of Appeal, for Defendant and Appellant.

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